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CITATIONS

627639—45——1

Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1944

ESTATE OF HENRY W. PUTNAM, GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 20–25) is reported at 45 B. T. A. 517. The opinion of the Circuit Court of Appeals (R. 40–45) is reported at 144 F. 2d 756.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 25, 1944 (R. 45–46). The petition for a writ of certiorari was filed on October 2, 1944, and was granted on November 13, 1944 (R. 47). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether dividends declared before the death of an individual stockholder but payable by the terms of the declaration to stockholders of record on dates which occurred after his death accrued prior to the date of death within the meaning of Section 42 of the Revenue Act of 1938 so that they are includible in income for the taxable period in which fell the date of death.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
>
> The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> ART. 42-1. *When included in gross income.*—Except as otherwise provided in section 42 in the case of the death of a taxpayer, gains, profits, and income are to be

included in the gross income for the taxable year in which they are received by the taxpayer, unles they are included as of a different period in accordance with the approved method of accounting followed by him. (See articles 41-1 to 41-3.) If a taxpayer has died there shall also be included in computing net income for the taxable period in which he died amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period, regardless of the fact that the decedent may have kept his books and made his returns on the basis of cash receipts and disbursements. * * *

STATEMENT

The facts were found by the Board of Tax Appeals as stipulated (R. 22). They may be summarized as follows:

Henry W. Putnam died on March 30, 1938, a resident of New York City. On the date of his death he owned shares of stock in certain New Jersey, Delaware, Pennsylvania, and Maine corporations. Prior to his death, each of these corporations declared cash dividends which were payable in terms to stockholders of record on dates subsequent to Putnam's death. The dividends were paid to the Guaranty Trust Company of New York as the executor of Putnam's estate after his death. (R. 22-23.) The following table shows the corporations, states of incorporation,

the amounts of the dividends, the dates on which the dividends were declared and paid, and the record dates thereof (*ibid.*):

Corporation	State of incorporation	Amount of dividends	Declaration date	Record date	Payment date
1. American Smelting & Refining Co.	New Jersey	$2,400.00	3/1/1938	5/6/1938	5/31/1938
2. General Motors Corp.	Delaware	1,568.75	2/7/1938	4/4/1938	5/2/1938
3. United Profit Sharing Corp.	Delaware	25.00	2/24/1938	3/31/1938	4/30/1938
4. Westinghouse Air Brake Mfg. Co.	Pennsylvania	825.00	11/16/1937	3/31/1938 6/30/1938 9/30/1938	4/30/1938 7/30/1938 10/31/1938
5. Hecker Products Corp.	New Jersey	300.00	3/23/1938	4/9/1938	5/2/1938
6. Philadelphia Co.	Pennsylvania	58.00	3/18/1938	4/1/1938	4/25/1938
7. United States Smelting, Refning & Mining Co.	Maine	875.00	3/23/1938	4/1/1938	4/15/1938
8. American Can Co.	New Jersey	18,000.00	3/29/1938	4/25/1938	5/16/1938

The Guaranty Trust Company of New York, as executor, filed an income tax return for the estate for the taxable period from March 30, 1938, to December 31, 1938, and included as income therein the dividend of $2,400 declared and paid by American Smelting & Refining Company. The executor also filed an income tax return for the decedent for the taxable period from January 1, 1938, to March 30, 1938, and included therein the dividends, totaling $21,651.75, declared and paid by the other corporations. (R. 23–24.)

The Commissioner determined a deficiency against the decedent for the period from January 1, 1938, to March 30, 1938, on the ground in part that the dividend of $2,400 which the estate had treated as its income for the later period, should be included in decedent's income for the period

prior to his death (R. 16–18). However, in order to protect the interests of the Government, the Commissioner also determined a deficiency against the estate for the period from March 31, 1938, to December 31, 1938, on the ground in part that the dividends of $21,651.75, included by the executor in the decedent's income, should be included in the income of the estate for this period (R. 8–10). The executor appealed to the Board of Tax Appeals from both determinations (R. 4–7, 12–15). The cases were consolidated for hearing and decision (R. 21).

The Board held (R. 24–25), five members dissenting without opinion, that the dividends of the New Jersey corporations, amounting to $20,700, constituted income accrued prior to March 30, 1938, and should be included in the decedent's income for the period from January 1, 1938, to March 30, 1938, from which conclusion the executor petitioned for review (R. 33–36). The Board also held that the dividends of the Delaware, Pennsylvania, and Maine corporations, totaling $3,351.75, accrued subsequent to the date of death and constituted income of the estate, from which conclusion the Commissioner petitioned for review (R. 27–30).

The Circuit Court of Appeals decided, one judge dissenting, that the dividends of all the corporations accrued within the meaning of Section 42 of the Revenue Act of 1938 on the date

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on which they were declared and should be included in decedent's income for the period in 1938 prior to the date of death (R. 40–45).

SUMMARY OF ARGUMENT

The dividends which were declared prior to decedent's death accrued as income of the decedent prior to his death in the broad sense in which the term "accrued" is used in Section 42 of the Revenue Act of 1938. The dividends represented amounts earned on decedent's stock investments prior to his death. Upon declaration of the dividends the decedent received an immediate economic benefit. He had the right to receive the dividends so long as he retained the dividend stocks; furthermore, if he had sold the stocks, he would not have lost the benefit of the dividends, for the price he received would represent payment for both the dividends and his equity interest. Upon declaration of the dividends, the corporations became irrevocably indebted for the dividends and the decedent's right to receive them was fixed, unless by his own act he divested himself of that right. The fact that the decedent may not have had perfect legal title to the dividends prior to his death is immaterial in determining whether there has been an accrual under Section 42. Furthermore, since these dividends would properly be included as part of the gross estate, the Congressional purpose is served by treating them as income accrued

prior to death. Even if ordinary accounting principles are taken as the test, the dividends would properly be accrued as income upon the dates on which they were declared.

The regulation which specifies the time at which dividends are includible in income, whether the taxpayer reports his income on the cash or accrual basis, does not apply to the year in which a taxpayer dies, for the reason that Section 42 provides a special rule for accruing in the short period ending with death all income which has been earned at that time. Section 115 (a) of the Revenue Act of 1938 merely defines a dividend and does not purport to prescribe the time when such dividend is to be included in income; hence that Section is irrelevant to the question in this case.

ARGUMENT

THE DIVIDENDS ARE TAXABLE AS ACCRUED INCOME OF THE PERIOD ENDING WITH THE DATE OF DEATH

Section 42 of the Revenue Act of 1938 (*supra*, p. 2) provides for the inclusion in income of a deceased taxpayer for the taxable period in which falls the date of his death of amounts which have accrued up to the date of death, if not otherwise properly includible in that period or in a prior period. Thus, if the dividends involved in this case, which were declared prior to decedent's death on March 30, 1938, but which were payable to stockholders of record on dates in 1938 sub-

sequent to his death, "accrued" prior to the date of death, as the term "accrued" is used in Section 42, they are includible in income for that period.[1]

The object of Section 42, which was first enacted in the Revenue Act of 1934, was to guarantee the inclusion in income of all amounts accrued up to the date of death, regardless of the fact that the decedent may have kept his books on the cash basis. At the time Section 42 was enacted, it had been determined that income of a cash basis taxpayer, which had accrued prior to death, could not be taxed as income of his estate when received but, on the contrary, the right to receive such amount was transferred to the estate upon death as a part of the corpus.[2] Consequently, unless such income was to be taxed in the period prior to the date of death, it escaped income tax altogether. H. Rep. No. 704, 73d Cong., 2d Sess., p. 24 (1939-1 Cum. Bull. (Part 2) 554, 572);

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[1] The Commissioner determined that all the dividends were includible in the period ending with decedent's death (R. 16-18), but solely to protect the revenue in the event of an adverse decision on his first determination the Commissioner also determined a deficiency due from the estate for the period after death based on inclusion of all the dividends in income of that period (R. 8-10). Argument in the alternative will not be made here, since we believe the dividends are rightly includible as income of the period ending with the date of death.

[2] See, for example, *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584; and *Heller* v. *Commissioner*, 10 B. T. A. 53. The principle had been specifically applied to dividends declared prior to the date of death but paid to the executor after death in *Vanderbilt* v. *Commissioner*, 11 B. T. A. 291, and *Clark* v. *Commissioner*, 12 B. T. A. 425.

S. Rep. No. 558, 73d Cong., 2d Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 586, 608).[3] That Congress was concerned directly with dividends in enacting Section 42 is shown, not only by the fact that the Board's decisions in *Vanderbilt* v. *Commissioner*, 11 B. T. A. 291, and *Clark* v. *Commissioner*, 12 B. T. A. 425, had created the situation with respect to dividends which Section 42 was designed to remedy, but also by the fact that the conference committee report on the 1934 revenue bill refers to dividends as income which would be affected by the new provision.[4]

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[3] Section 134 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, amended Section 42 by eliminating the provision taxing income which has accrued prior to death to the decedent and substituting a provision whereby such items are taxed as income to the estate or the persons receiving such amounts by bequests, inheritance or survivorship. One of the purposes of Section 134 was to remove the hardship of pyramiding accrued income in the period in which death occurred. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 83–88; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100–105. Section 134 applies in terms to taxable years commencing after December 31, 1942, but it could be made retroactive to January 1, 1934, in any case at the option of a taxpayer, provided the estate and all those entitled to receive such amounts filed consents prior to January 1, 1944. See Section 134 (g); Treasury Regulations 103, Section 19.126–4 (b), as added by T. D. 5233, 1943 Cum. Bull. 198, 208; Treasury Regulations 111, Section 29.126–4. Section 134 does not apply to this case because the taxpayer here has not elected to take its benefits by filing the necessary consents.

[4] H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 18 (1939–1 Cum. Bull. (Part 2) 627, 629) is in part as follows:

> Amendment no. 27: Under the House bill all items of income and deductions accrued up to the date of the

In *Helvering* v. *Enright,* 312 U. S. 636, this Court held that the decedent's share of the profits earned up to the date of death, but not then received, of a law partnership must be included in decedent's income for the period ending with his death under Section 42, even though both decedent and the partnership were on the cash receipts and disbursements system of accounting. The Court interpreted the term "accrued" in Section 42 as having a broader scope than the term "accrued" in Section 48 relating to the accrual method of accounting. It said (pp. 644–645):

> It has been frequently said, and correctly, that § 42 was aimed at putting the cash receipt taxpayer on the accrual basis. But that statement does not answer the meaning of accrual in this section. Accounts kept consistently on a basis other than cash receipts might treat accruals quite differently from a method designed to reflect the earned income of a cash receipt taxpayer. Accruals here are to be construed in furtherance of the intent of Congress to cover into income the assets of

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death of the decedent were required to be reflected in the last return filed for the decedent, regardless of the fact that he may have kept his books on a cash basis. The Senate amendment makes a clarifying change to the effect that a credit of the accrued items [in computing the normal tax], such as dividends and interest on partially tax-exempt securities, will also be permitted in such cases. The House recedes.

> decedents, earned during their life and unreported as income, which on a cash return, would appear in the estate returns.

See also *Pfaff* v. *Commissioner*, 312 U. S. 646.

Thus, Section 42 instituted a special kind of accrual basis to govern the reporting of income for the short period ending with the date of death. The method of reporting income for the years prior to that in which death occurred was not disturbed by Section 42; the individual taxpayer continued to report on a yearly basis in accordance with his ordinary method of accounting, which in the case of an individual is usually the cash basis. But in the year when death occurred, the decedent taxpayer was shifted by Section 42 to a method of accounting for the short period ending with his death, under which his return for that period was required to include all income "earned" up to the date of death which had not been previously included in income, although such income was received by his executors after his death. In the case of dividends the test prescribed by Section 42, which determines the time for their inclusion in the income of a deceased taxpayer, is radically different from the test which determines the time for taxation of dividends to a living taxpayer in an ordinary year, as will be shown.

It has uniformly been held that dividends constitute accrued income within the meaning of Sec-

tion 42 at the time they are declared, even though the dividends are in terms payable to stockholders of record on a date subsequent to the date of death. *Commissioner* v. *Cohen,* 121 F. 2d 348 (C. C. A. 5th); *Helvering* v. *McGlue's Estate,* 119 F. 2d 167 (C. C. A. 4th); *First Nat. Bank & Trust Co.* v. *Glenn,* 36 F. Supp. 552 (W. D. Ky.); *Estate of Ledyard* v. *Commissioner,* 44 B. T. A. 1056, 1065, reversed on other grounds *sub nom. Commissioner* v. *United States Trust Co.,* 143 F. 2d 243 (C. C. A. 2d). See also *Bach* v. *Rothensies,* 124 F. 2d 306 (C. C. A. 3d), certiorari denied, 316 U. S. 666, holding that declared dividends had accrued at the date of death of a trust beneficiary within the meaning of Section 42, even though they had not been paid to the trust of which the decedent was a beneficiary and even though the trust agreement expressly prohibited the payment of income to beneficiaries prior to collection.[5]

[5] In *Sharp* v. *Commissioner,* 91 F. 2d 802 (C. C. A. 3d), reversed on other grounds, 303 U. S. 624, the question was whether a dividend declared prior to a decedent's death but payable to stockholders of a record date subsequent to death and paid to his executors after death constituted corpus of the estate for estate tax purposes. In deciding that the dividend represented income to the estate, the court pointed out that the executors had reported the amount as income and that its inclusion in corpus also would result in double taxation. Its conclusion seems to have been motivated in part at least by this consideration. The case, however, is not a precedent indicating that the dividends in the instant case would properly be reported as income for the period after death, rather than for the period ending with the date of date. The

The conclusion of the court below that the dividends had accrued within the meaning of Section 42 seems manifestly correct in view of this Court's interpretation of the controlling statute that income earned prior to the date of a decedent's death, although not then received or receivable, must be attributed as accrued income of the taxable period prior to death.[6] *Helvering* v. *Enright*, 312 U. S. 636. It is clear that the dividends here in question were so earned.

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issue as to whether the dividend had "accrued" prior to the date of death so that it was includible in income for the period ending with the decedent's death was not involved in the *Sharp* case, and the Revenue Act of 1926 by which the case was controlled did not contain the provision of Section 42 (as pointed out *supra*, p. 8; Section 42 first appeared in the Revenue Act of 1934) with which the instant case is concerned. Although handed down after the enactment of the 1934 Act, the court's statement in the *Sharp* case that the right of the decedent to the declared dividend did not mature during his life is therefore in no sense a holding that the dividend was not accrued income within the meaning of Section 42. It should be noted that the court did recognize, however, that upon declaration the amount of the dividend was thereby taken out of the assets of the corporation and became a debt of the corporation to the stockholders to whom it was payable.

[6] The Board of Tax Appeals, following *Helvering* v. *McGlue's Estate*, 119 F. 2d 167 (C. C. A. 4th), decided the present case on the theory that the date on which a dividend accrues under Section 42 is determined by the date on which the corporation becomes indebted for the dividend and that this in turn depends upon the law of the state in which the corporation is domiciled (R. 24–25). Both the taxpayer and the Government argued before the Circuit Court of Appeals that the question of when a dividend accrues under Section 42 is one of federal law requiring a uniform application and that state

In the first place, dividends are presumed to have been declared out of profits earned by the corporation prior to the dates on which they were declared. *Commissioner* v. *Cohen*, 121 F. 2d 348, 349 (C. C. A. 5th). The presumption, of course, is grounded on the basic proposition that the directors may legally declare ordinary dividends only out of earnings. Thus dividends are regarded as earned on the date on which they are declared. 11 Fletcher, Cyclopedia of Corporations (Perm. ed., 1932), Sec. 5377. Since the dividends in this case were all declared prior to decedent's death, they represent income earned on decedent's stock investments prior to his death.

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law concepts of when a dividend vests in the stockholder are not controlling on this question. The Circuit Court of Appeals adopted this view (R. 42). This Court indicated in *Helvering* v. *Enright*, 312 U. S. 636, that Section 42 is to be construed against the background of the Congressional intention in enacting it. Consequently we think there is no question that a single rule should test the accrual date of a dividend under Section 42, irrespective of the varying laws of the states of incorporation of the corporations which declared the dividends. See also *Lyeth* v. *Hoey*, 305 U. S. 188, 194.

We believe that the *McGlue* case was correctly decided but that the court erroneously rested its decision in part on the theory that state law controls the question of when dividends accrue under Section 42. It seems clear that the court did not rely solely on state law however, but also on the general proposition that the declaration of the dividend immediately created a corporate debt. The Board followed the *McGlue* case and applied local law in *Estate of Ledyard* v. *Commissioner*, 44 B. T. A. 1056, reversed on other grounds *sub nom. Commissioner* v. *United States Trust Co.*, 143 F. 2d 243 (C. C. A. 2d).

This fact alone would seem to be enough to attribute the income under Section 42 to the taxable period in which death occurred.

Furthermore, the declaration of a dividend, even though the dividend is payable in the future, is generally recognized as effecting an increase in the market price of the dividend stock, if other factors remain constant. See *Commissioner* v. *Cohen*, 121 F. 2d 348, 349 (C. C. A. 5th); *First Nat. Bank & Trust Co.* v. *Glenn*, 36 F. Supp. 552, 556 (W. D. Ky.); *Richter & Co.* v. *Light*, 97 Conn. 364; *Ford* v. *Ford Manufacturing Co.*, 222 Ill. App. 76. Although taxpayer disputes this fact,[7] it seems that the declaration would tend to cause a price increase. The declaration effects a severance of the amount of the dividend from the general equity interest of the stockholders in the corporate assets. By reason of the declaration

[7] The taxpayer argues (Br. 12–15) that the declaration of a dividend usually has no effect on the market price of stock and refers for verification to the market quotations of listed stocks. We submit that the market quotations after the declaration of a dividend in themselves do not disprove the general proposition that the declaration of a dividend tends to increase the price of the stock, for the quotations reflect the interplay of all factors, not that of the dividend declaration alone, which affect the market price of the stock. Nor does the fact that the price of stock, as listed on the stock exchanges, drops on the record date by the amount of the dividend pursuant to stock exchange rules require any different conclusion. Such fact only confirms the general understanding that the right to receive a dividend does affect the market price of stock, for otherwise the separation of the dividend from the stock would have no effect on the market price.

there has been added to the stockholders' equity interest, which is uncertain, inchoate, and indeterminate until dissolution of the corporation, a fixed right to share presently in the assets to the extent of the dividend, so long as the stock is not transferred. It is a basic fact that the right to receive money at a fixed present time is more valuable than the right to receive it at an undetermined time in the future and hence the creation by the declaration of a fixed right to receive the dividend would tend to increase the market price for the stock to reflect the dividend as well as the equity interest, unless other factors offset such increase.

But even if the declaration of a dividend is not regarded as increasing the market price of the stock, after the declaration the stockholder has two interests in place of one: an equity interest and a right to the dividend, which he will receive personally unless he sells his stock before the record date or dies before the dividends are paid. But in either of those events, he or his estate will receive the full economic value of the dividends. If he disposes of the stock before the record date, the price he receives for the stock will be consideration for both interests and consequently will reflect the dividends. If he dies before payment, his estate would take the stock, plus the right to the dividends.

Thus, in any view which may be taken, upon declaration of the dividends in this case there

accrued to the decedent an immediate economic gain which was presently realizable had he elected to sell his stocks. See *First Nat. Bank & Trust Co.* v. *Glenn*, 36 F. Supp. 552, 556 (W. D. Ky.). The court summarized the point in *Commissioner* v. *Cohen*, 121 F. 2d 348, 349 (C. C. A. 5th):

> The stockholder receives the value of a dividend when it is declared, for if it is immediately paid he has his stock and his dividend, and if payment is deferred he has the value of his stock increased by the amount of the dividend upon it.

This economic benefit, which the decedent acquired upon declaration of the dividends, coupled with the fact that the dividends were earned during decedent's lifetime requires, we submit, that they be taxed as accrued income within the meaning of Section 42.

In addition, it is the general rule that a corporate resolution declaring a dividend creates a debtor-creditor relationship between the corporation and its stockholders for the amount of the dividend, even though the dividend may be payable in the future. After the dividend is declared and the declaration is communicated to the stockholders, it may not be rescinded and the liability of the corporation to pay is irrevocably fixed. See *Realty Inv. Co.* v. *Moore*, 104 F. 2d 716 (C. C. A. 6th); *Carney* v. *Crocker*, 94 F. 2d 914 (C. C. A. 1st); *Sharp* v. *Commissioner*, 91 F. 2d 802 (C. C. A. 3d), reversed on other grounds, 303 U. S. 624; *Alexander*

& Alexander v. *United States,* 22 F. Supp. 921, 922–923 (D. Md.); *Staats* v. *Biograph Co.,* 236 Fed. 454 (C. C. A. 2d); *United States* v. *Guinzburg,* 278 Fed. 363 (C. C. A. 2d); *Vanderbilt* v. *Commissioner,* 11 B. T. A. 291; 11 Fletcher, Cyclopedia of Corporations (Perm. ed., 1932), Sections 5322 and 5323; Kehl, Corporate Dividends (1941) 184–185. It is true that, where the dividend is in terms payable to stockholders of record on a future date, the precise identity of the stockholder who will receive the dividend is not known until that date arrives. It is for this reason that some courts have held, in cases involving a contest over the dividend between two claimants, that title to the dividend does not vest in any stockholder until the record date arrives and that the stockholder on that date is the owner of the dividend.[8] Other courts take the view that title to the dividend vests in the stockholder on the date the dividend is declared, the record date being

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[8] *Buchanan* v. *National Savings & Trust Co.,* 23 F. 2d 994 (App. D. C.); *Alexander & Alexander* v. *United States,* 22 F. Supp. 921, 922–923 (D. Md.); *Smith* v. *Taecker,* 133 Cal. App. 351; *Richter & Co.* v. *Light,* 97 Conn. 364; *Ford* v. *Ford Manufacturing Co.,* 222 Ill. App. 76; *Nutter* v. *Andrews,* 246 Mass. 224; *Burroughs & Springs* v. *N. C. Railroad Co.,* 67 N. C. 376; *In re Estate of Wuichet,* 138 Ohio St. 97. *Cf. Sharp* v. *Commissioner,* 91 F. 2d 802 (C. C. A. 3d), reversed, 303 U. S. 624; and see dictum in *Opperman's Estate (No. 1),* 319 Pa. 455, 464, which seems inconsistent with *Nirdlinger's Estate (No. 1),* 327 Pa. 160, 165.

treated as a mere convenience to the corporation to protect it in paying dividends.[9] But even those cases cited by the Tax Court (R. 24) which hold that the right to receive the dividend vests in the owner of the stock on the record date do not hold that the declaration of the dividend can thereafter

The rule of these cases, however, has been soundly criticized by writers and has been said not to represent the weight of authority but to be merely a minority exception to the general rule. See Note: When Do Dividends Vest?, 27 Georgetown L. J. 74 (1938); Note: Rights in Ordinary Corporate Dividends: Significance of Date of Closing Transfer Books, 38 Harv. L. Rev. 245 (1924); Notes on Recent Cases, 8 Minn. L. Rev. 541 (1924); Chaplin, Declaring Dividends for Future Stockholders, 13 Col. L. Rev. 401 (1913). See also *Lancaster Trust Co.* v. *Mason*, 151 N. C. 264, which criticizes the earlier decision in *Burroughs & Springs* v. *N. C. Railroad Co., supra*, as being against the weight of authority, but does not overrule it, such action not being necessary for the decision.

[9] *Lamberth* v. *Commissioner*, 120 F. 2d 101, 105 (C. C. A. 9th); *First Nat. Bank & Trust Co.* v. *Glenn*, 36 F. Supp. 552 (W. D. Ky.); *Ford* v. *Snook*, 205 App. Div. 194, affirmed *per curiam*, 240 N. Y. 624; *Beattie* v. *Gedney*, 99 N. J. Eq. 207, 212; *Western Sec. Co.* v. *Silver King Con. Min. Co.*, 57 Utah 88. Cf. *Realty Inv. Co.* v. *Moore*, 104 F. 2d 716 (C. C. A. 6th), and *United States* v. *Southwestern R. Co.*, 92 F. 2d 897 (C. C. A. 5th), where the record date was treated as having no significance. Cf. also *Heyn* v. *Fidelity Trust Co.*, 174 Md. 639, 643, and *Zell* v. *Safe Dep. & Trust Co.*, 173 Md. 518. Whether a subsequent statute has altered the rule of *Ford* v. *Snook, supra*, in New York is not finally decided. Two surrogates have taken opposite views on the matter. Cf. *In re Depew's Estate*, 179 Misc. 1074, with *Matter of Bashford*, 178 Misc. 951.

be revoked,[10] and hence do not affect the proposition that the liability of the corporation to pay has become inalterably fixed. Furthermore, in those cases where a stockholder has sold his stock after the dividend was declared but before the record date, the courts have emphasized the fact that the vendor must have received a price equivalent to his equity interest plus the dividend, and therefore should not be permitted to recover doubly. See, *e. g., Richter & Co.* v. *Light*, 97 Conn. 364, 369, 371–372. Clearly if it were not the law that a dividend was irrevocable once declared, the owner of the stock on the date of declaration would not on a subsequent sale be assumed to have secured a price for the stock reflecting the declared dividend.

The precise time when legal title to the dividends may have vested in decedent or his executor is irrelevant to the question of accrual under Section 42. This Court has made that point clear in *Helvering* v. *Enright*, 312 U. S. 636, where it was held that the interest of Enright in the unfinished work of his law partnership had accrued at the date of his death, although it is obvious that the right to receive the amount from the clients had not vested in the partnership or

[10] *Alexander & Alexander* v. *United States*, 22 F. Supp. 921, 923 (D. Md.) expressly holds that a declared dividend cannot be revoked, even though it is payable to stockholders of record of a future date.

Enright at the time of his death. See *supra*, pp. 10–11. Moreover, this is not a case where the dividends are claimed by two persons so that the legal title to the dividends is directly involved. The decedent owned the stocks until his death and consequently he also owned the *prima facie* right, which could only be defeated by a voluntary transfer of the stocks, to receive the declared dividends. At his death these rights passed to his estate. The precise time at which this *prima facie* right to the dividends became a vested right is immaterial in considering when the dividends were earned and accrued.

Since upon the declaration of the dividends in this case the eight corporations became irrevocably committed to pay the dividends, and to the decedent unless he disposed of the stocks prior to the record date, the dividends had accrued prior to the date of decedent's death. This conclusion as to accrual is inescapable when there are added the facts that the dividends had been earned when they were declared and that the decedent at the time received a clear economic benefit.

The dissenting judge below rested his dissent upon the fact that it was not certain upon the dates of declaration that the decedent would receive the dividends (R. 44–45). He stated that the doctrine that the dividends had accrued as income prior to death might not work unfairly when applied between a decedent and his ex-

ecutors, but that when applied to sales it would lead to preposterous results because the dividend would be doubly taxed, once as a dividend and once as a part of the gain upon sale (R. 44). The fallacy of this statement is that there would be no occasion to apply Section 42 if the decedent had sold his stock prior to his death. As has already been shown, Section 42 has a very limited scope, confined entirely to the short period, preceding death, of the year in which the taxpayer dies. It applies only when the decedent's estate has or will in fact receive after his death amounts which as income are attributable to the period before death by reason of having been earned then. If a decedent disposes of his stock and declared dividends prior to his death, his estate will not receive the dividends after his death. Therefore the question whether they had accrued prior to death could not arise. Consequently, the only income which would be taxed in the period prior to death, if the stocks were sold before death, would be the gain on the sale of the stocks, which gain would of course reflect the dividend.

A further important consideration is that the decision of the court below gives effect to the Congressional purpose underlying Section 42 in treating as accrued income items which pass to the executor as a part of the gross estate. Article 13 of Treasury Regulations 80 (1937 Ed.), pertaining to the estate tax, provides as follows:

Outstanding dividends and accrued interest should be included in the gross estate. Dividends on either common or preferred stock should be separately listed on the return if declared prior to the applicable valuation date, and not reflected in the market value of the stock on that date. Thus, dividends both declared and payable to holders of record on a date prior to the valuation date, should be separately included, provided the stock is valued "ex dividend" on the valuation date.

Example: A 5 per cent dividend upon stock is declared March 1, payable on April 1, to stockholders of record on March 15. If the applicable valuation date is March 10, and the market value on that day was 90, the value to be returned for both stock and dividend is 90, the dividend being reflected in the market value of the stock. If the applicable valuation date is March 20, the dividend is not reflected in the market value, and must be returned in addition to the market value of the stock on March 20.[11]

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[11] This provision was amended by T. D. 5047, 1941-1 Cum. Bull. 425, to read as follows (p. 426):

> * * * dividends declared to stockholders of record on or before the date of the decedent's death and not collected at such date constitute part of the gross estate.

This amendment is not applicable to this decedent since he died on March 30, 1938. The amended regulation furthermore is not contrary to our position that dividends declared prior to death but payable to record holders of a date after death is a part of the gross estate, since the Treasury Deci-

Thus, the dividends in this case properly constitute a part of the gross estate, either as part of the value of the stocks if that value included the dividends, or as separately listed dividends. They could not properly be treated as income of the estate when received, since the receipt of the dividends in cash was merely a conversion into money of one of the assets of the estate. See *Vanderbilt* v. *Commissioner,* 11 B. T. A. 291. *Sharp* v. *Commissioner,* 91 F. 2d 802 (C. C. A. 3d), reversed on other grounds, 303 U. S. 624, is authority for the proposition that dividends cannot be both a part of the corpus of the estate and income to the estate. We believe, however, that the *Sharp* decision is erroneous in holding that the dividends there were income rather than a part of the gross estate, since it is contrary to the regulation and is out of harmony with the *Vanderbilt* case and *Nichols* v. *United States,* 64 C. Cls. 241, certiorari denied, 277 U. S. 584, with which Section 42 was intended to be synchronized. See pp. 8–9, *supra.* The discussion of Section 42 in the Committee Reports (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 84; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 101) upon the amendments made by Section 134 of the Revenue Act of 1942, c. 619, 56 Stat. 798, further indicates that declared dividends are well within the scope of Section 42 (see fn. 3, *supra*, p. 9).

sion is silent on the subject, and in fact the Bureau practice has continued unchanged after the amendment.

The foregoing discussion demonstrates, we think, that the dividends in this case had accrued within the meaning of Section 42 as income of the decedent prior to his death. As has been pointed out, the term "accrued" as used in Section 42 is not restricted to cases of accrued income in the ordinary accounting sense, but even if principles of accrual accounting are applied as the test, the conclusion follows that the dividends in this case accrued when they were declared (see *Campbell* v. *Commissioner,* 6 B. T. A. 60). The directors' resolutions fixed the amounts of the dividends with certainty and the liability of the corporations to pay them. It is true that when the dividends were declared, the decedent's right to receive them as such in cash was dependent upon his holding the stocks until the record date, but the decedent himself controlled the right to receive; it was in his power to hold the stock until the record date and receive the dividend or to sell it and receive its value. Had he sold his stock before the record date the sale would have carried with it the right to receive the dividends. But we submit that any creditor has the right to sell or assign his claim, yet the mere possibility of its being sold or assigned would not defer accrual of the gain as income. Hence, we think that the decedent had a right to receive the dividends at the time they were declared such as would justify their accrual, if ordinary principles of accrual accounting were to be applied.

(See *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184–185, rehearing denied, 292 U. S. 613; *Continental Tie & L. Co.* v. *United States*, 286 U. S. 290; *H. Liebes & Co.* v. *Commissioner*, 90 F. 2d 932 (C. C. A. 9th); cf. *United States* v. *Anderson*, 269 U. S. 422; *Brown* v. *Helvering*, 291 U. S. 193). This conclusion finds strong support in the leading accounting authorities. Because an irrevocable corporate debt is created upon declaration of a dividend, accounting theory prescribes that the declared dividend be *instanter* listed as a liability of the corporation declaring it and as an asset and income of the stockholder at the date of declaration, even though a record date may be involved. Kohler and Morrison, Principles of Accounting (2d Ed., 1931) 274; Esquerre, Applied Theory of Accounts (1914) 30, 301, 362; Paton, Accountants' Handbook (2d Ed., 1934) 278, 1008; Paton, Essentials of Accounting (1938) 324, 325; Bell, Auditing (1924) 147, 274. This is also the rule recommended in uniform accounting systems by federal regulatory agencies. See S. E. C., Uniform System of Accounts for Public Utility Holding Companies (1936) 14, Acc't. No 116; F. C. C., Uniform Systems of Accounts for Telephone Companies (1935) 32, Acc't. No. 121; F. P. C., Uniform System of Accounts Prescribed for Public Utilities and Licenses (1936) 23, Acc't. No. 128; I. C. C., Uniform System of Accounts for Electric Rail-

ways (1914) 82, Acc't. No. 412; S. E. C., Instruction Book for Form A-2 for Corporations 34, item 24.

The case of *Tar Products Corp.* v. *Commissioner,* 130 F. 2d 866 (C. C. A. 3d), relied on by taxpayer (Br. 9), does not support taxpayer on the proposition that the dividends in this case did not accrue until after decedent's death. There was no issue in that case as to when a dividend "accrues," either under ordinary accrual concepts or under Section 42. The question was whether the Tar Products Corporation, which reported its income under the accrual basis of accounting, should report a dividend as income of the year in which it was declared or as income of the year in which it was "received." The applicable regulation [12] provided that—

> A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands.

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[12] Article 115-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936. Article 42-3 is to the same effect. This language was originally incorporated in Section 201 (e) of the Revenue Act of 1921 but was omitted in subsequent Revenue Acts. The provision was also contained in Articles 53 and 1541 of Treasury Regulations 62, promulgated under the Revenue Act of 1921. It was continued in subsequent regulations and was in effect in the year 1938 as Articles 115-1 and 42-3 of Treasury Regulations 101, promulgated under the Revenue Act of 1938.

The court held under this regulation that the dividend was includible in income in the year in which it was received by the taxpayer because it was not unqualifiedly subject to the demand of the stockholder before that time.[13] The court pointed out that the regulation makes no distinction between cash and accrual basis taxpayers and establishes the same criterion for both to determine when a dividend shall be included in income. Thus the court did not decide the question of when a dividend accrues as income even under ordinary accounting principles.

The regulation which the court construed in the *Tar Products* case does not apply to a Section 42 case. The regulation may direct that the time for taxing dividends to an accrual basis taxpayer is the time when the dividend is received in years where a taxpayer is alive to receive the dividend, but Section 42 makes an exception to this rule for the year in which the taxpayer dies. The

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[13] In *Avery* v. *Commissioner*, 292 U. S. 210, this Court held that a dividend became unqualifiedly subject to the demand of a cash basis taxpayer when the check in payment of the dividend was received. Cf. also *Mason* v. *Routzahn*, 275 U. S. 175.

The *Tar Products* case has been followed by the Tax Court in *Koppers Co.* v. *Commissioner*, 3 T. C. 62, petition for review pending on other issues (C. C. A. 3d), and *American Light & Traction Co.* v. *Commissioner*, 3 T. C. 1048. The Tax Court has therefore overruled by implication its earlier contrary decision in *Campbell* v. *Commissioner*, 6 B. T. A. 60 (see p. 25, *supra*).

inquiry as to the time when a dividend "accrues" to a living taxpayer who reports his income on the accrual basis of accounting is foreclosed by reason of the regulation, which in effect removes dividends from the category of accruable items and substitutes a "receipt" test, but the inquiry as to the time dividends accrued to a deceased taxpayer is necessitated by Section 42, because that Section makes accrual the determining factor. And since the regulation dates from 1921 and thus preceded Section 42 by many years, the regulation could not have been intended as an interpretation of the word "accrued" as used in Section 42. Moreover, as has already been pointed out (*supra*, pp. 9, 24), the Committee Reports show that the term "accrued" was used in Section 42 by Congress, with dividends specifically in mind, in a specialized and broad sense, which is quite different from the long-standing rule of the regulation. The only possible conclusion is that Section 42 and the regulation are mutually exclusive in their respective fields.

Nor is Section 115 (a) of the Revenue Act of 1938, upon which taxpayer relies (Br. 9–10), relevant to the question involved in this case. That Section is as follows:

> (a) *Definition of Dividend*.—The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money

> or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * *.

The taxpayer argues that the decedent did not have income from dividends prior to his death on the theory that the amounts declared became dividends within this definition only when the distribution was made to the stockholders. We submit that this contention is an unreasonable interpretation of that Section, which defines a dividend by specifying the sources from which a corporate distribution must be paid to result in a dividend. The word "made" in the statute does not refer to the time at which any distribution will become a dividend, but on the contrary refers to the source of the distribution; that is, a dividend is a distribution made out of accumulated earnings or out of earnings of the taxable year. We submit there is no merit to the contention that under Section 115 (a) there can be no accrued income from dividends until the distribution has been "made."

If in the special circumstances suggested by taxpayer (Br. 11), an item of corporate distribution would be treated differently for a decedent taxpayer, the result would not be unique in recognizing that death may capitalize certain items. Cf. *Bull* v. *United States*, 295 U. S. 247, 256–257.

The Court will observe that the $825 dividend of Westinghouse Air Brake Company was declared on November 16, 1937, payable in three installments to stockholders of record on March 31, 1938, June 30, 1938, and September 30, 1938 (R. 23). It might seem that this particular dividend should not be treated as having accrued in the period from January 1, 1938, to March 30, 1938, because it was not declared during that period. But analysis refutes this. During the year 1937 when the Westinghouse dividend was declared, the decedent reported his income on the cash basis. Hence he was not required to report the declared dividend as income of 1937, because it was not then unqualifiedly subject to his demand. However, upon his death on March 30, 1938, the decedent was shifted by Section 42 for the first three months of that year to the special accrual plan of reporting income prescribed therein. Under this Section, his executor was required to report, as decedent's income of the short period, earned income which was not properly includible in a prior period. Since this dividend was not properly includible in 1937 by the decedent, it is to be included in the return for the short period preceding death because it accrued prior to death. *Cf. Estate of Lambert* v. *Commissioner,* 40 B. T. A. 802, 805–806.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 534.—October Term, 1944.

Estate of Henry W. Putnam; Guaranty Trust Company of New York, Executor, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 26, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This case brings here for review a judgment which applies Section 42, Revenue Act of 1938,[1] so as to "accrue" corporate dividends on the date of their declaration rather than the later record or payment dates. The result is that the dividends are taxable as income to a decedent taxpayer instead of to his estate.

Certiorari was granted[2] because of a conflict in conclusion between *Tar Products* v. *Commissioner*, 130 F. 2d 866, and this case as to the date of accrual of corporate dividends. The resolution of this conflict is complicated by further conflicts between the decision below and those in other circuits as to whether the governing rule is to be drawn from federal or state law. *Helvering* v. *McGlue's Estate*, 119 F. 2d 167, 171; *Commissioner* v. *Cohen*, 121 F. 2d 348, 349.

The decedent, Henry W. Putnam, died on March 30, 1938. Prior to his death several corporations in which he owned stock declared dividends which by the resolutions were payable and were paid to stockholders of record on dates which were subsequent to his death. Each of these dividends, aggregating in all $24,051.75, was held by the Commissioner to constitute income to

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1 52 Stat. 447, 473, Sec. 42:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

2 323 U. S. —. Judicial Code, Section 240(a), as amended.

the decedent under the provisions of Section 42. The Board of Tax Appeals decided that the time of accrual depends upon the varying state decisions as to when a corporate debt arises upon a declaration of dividend with a provision for its payment to stockholders of record on some future date. 45 B. T. A. 517. This resulted in an agreement in part with the Commissioner's determination.

The Circuit Court of Appeals was of the view that federal law controlled the disposition of the controversy and that the dividend accrued on its declaration. *Commissioner* v. *Guaranty Trust Co., etc.,* 144 F. 2d 756.

We think the federal law controls. A federal revenue act applicable throughout the nation fixes liability on the decedent taxpayer under Section 42 if the dividend is "accrued." The meaning of that word in this section should be uniform unless Congress has shown an intention to permit its meaning to be varied by state law. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Palmer* v. *Bender,* 287 U. S. 551, 555; *United States* v. *Pelzer,* 312 U. S. 399, 402-3. Section 42 lays down the test of accrual for the taxation of a decedent's income and the definition of the meaning and extent of that test is a federal responsibility. The present problem is closely akin to that resolved in *Lyeth* v. *Hoey,* 305 U. S. 188, 193. In that case an heir received a sum in settlement of litigation over a will. Its taxability as income under the federal statute depended upon the meaning of the statutory exemption "acquired by inheritance." The law of the testator's domicile held sums paid as will compromises were not inheritances. Acting on the principle that in the interest of uniformity exemptions under federal statutes should be determined by federal courts, we reached a contrary federal rule. The same principle leads to our conclusion in this case.[3]

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[3] The Government calls attention to the conflict in state decisions as to the event which vests title according to state law to a corporate dividend. Some specify the declaration and some compliance with the requirement of being a stockholder of record on a subsequent date.

Declaration date: Ford v. Snook, 205 App. Div. 194, 196, aff'd 240 N. Y. 624; Beattie v. Gedney, 99 N. J. Eq. 207; Western Sec. Co. v. Silver King Con. Min. Co., 57 Utah 88, 113; 27 Georgetown L. J. 74; 38 Harv. L. Rev. 245.

Record date: Smith v. Taecker, 133 Cal. App. 351; Richter & Co. v. Light, 97 Conn. 364; Ford v. Ford Manufacturing Co., 222 Ill. App. 76, 84; Nutter v. Andrews, 246 Mass. 224.

Accrual under Section 42, however, is not dependent upon these varying concepts of when dividends vest. Despite possible difference between state

We recently examined the Congressional purpose in the enactment of Section 42. *Helvering* v. *Enright,* 312 U. S. 636. That purpose was to cover into income the "accruals" theretofore unreported as income of a decedent taxpayer who reported on a cash basis. By "accrual" the income so accrued became subject to income tax as decedent's income. These "accruals" had theretofore escaped taxation as the income of decedent, because no cash was received during decedent's life. Moreover, such payments were held not to be the income of decedent's estate on the theory that the "accrual" was a part of the corpus of the estate at death and therefore the estate's subsequent receipt of the "accruals" as cash was not income to the estate. *Helvering* v. *Enright, supra,* p. 639. In the instant case there is no avoidance of income taxes such as Section 42 was designed to prevent. If the dividend does not "accrue" to decedent on the date of declaration so as to be taxable as income to him, it will appear as an item of income in the income tax return of the estate or of the stockholder who owns the stock on the record date.[4] Taxwise, it may be important upon whom the tax falls as the sum assessed may vary according to the tax bracket of the taxpayer. This re-

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and federal income taxation of dividend items, the presumed Congressional purpose to have the national revenue acts uniformly administered leads to a federal interpretation of accruals under Section 42.

Such inconsistency would not occur if the federal accrual date under Section 42 is held eventually to be the same for taxpayers on the accrued and cash basis. Cf. Avery v. Commissioner, 292 U. S. 210; Tar Products v. Commissioner, 130 F. 2d 866.

[4] Respondent argues for the judgment below on the ground that the dividends could not properly be treated as income of the estate when received, since the receipt of the dividends in cash by the estate was merely a conversion into money of one of the assets of the estate, citing Vanderbilt v. Commissioner, 11 B. T. A. 291; Nichols v. United States, 64 Ct. Cl. 241; 80 Treas. Reg., Art. 13. The truth or error of this position depends upon whether those dividends are income, by virtue of the accrual provision of Section 42, to the decedent. If they are income to the decedent, they cannot be income also to the estate. If they are not income to the decedent, they are income to the estate. The Vanderbilt and Nichols cases were apparently decided on the theory that the items in controversy constituted income to the decedent and assets of the estate for estate tax purposes and therefore could not later be income to the estate. The regulation does not purport to direct the return as corpus of the estate of dividends declared but with a record date subsequent to the stockholder's death. Neither do the present regulations. 105 Treas. Reg., Sec. 81.13; cf. United States v. Phellis, 257 U. S. 156, 171.

Congress has modified Section 42 by an amendment which is inapplicable to this case. Revenue Act of 1942, Sec. 134, 56 Stat. 798, 830; H. Rep. No. 2333, 77th Cong., 2d Sess., Sec. 125, p. 83; S. Rep. 1631, 77th Cong., 2d Sess., Sec. 135, p. 100.

sult, however, is apart from the purpose of Congress in enacting Section 42 and is not significant in the interpretation of the section.[5]

We assume that decedent was a taxpayer on the cash receipts basis. Compare 144 F. 2d 756, 757.[6] Our inquiry leads us only to a decision as to whether a dividend accrues as income on its declaration with a subsequent record date, not to whether it accrues on its record date or its payment date. A declaration of a dividend to stockholders of record on the date of the resolution but payable in the future is not involved. This Court has suggested that a tax be deemed to accrue as a charge against a taxpayer when events "occur which fix the amount of the tax and determine the liability of the taxpayer to pay it." *United States* v. *Anderson*, 269 U. S. 422, 441. It has said also that accrual imports "that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income." *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184. The declaration of the dividends here in question fixes their amount but does not determine the distributee. He cannot be known with certainty until the record date. Nor does the stockholder have the right to receive payment upon the declaration. The words of the corporate resolution which arranges for the payment from the

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5 A reference to dividends appears in the legislative history but casts no light on the problem of the event which accrues a corporate dividend. See H. R. 7835, 73rd Cong., 2d Sess., printed with Senate amendments, March 28 (Calendar day, April 13), 1934; I. R. B. (C. B. 1939-1 (Part 2), p. 629, Amendment 27; Section 43, Revenue Act, 1934, 48 Stat. 694; Section 43, Revenue Act of 1938, 52 Stat. 473.

6 Therefore the construction of accrued according to the taxpayer's method of accounting, which is directed in Sec. 48(c), 52 Stat. 476, is not of use. Helvering *v.* Enright, 312 U. S. 636, 644. Avery *v.* Commissioner, 292 U. S. 210, holds that dividends of a living taxpayer on the cash basis would not become his income on mere declaration but only when "received," that is, unqualifiedly made subject to the stockholder's demand as by check. "Received" in the section there under consideration was the word designating taxability as income of sums actually or constructively collected, including dividends, as it is in the section of the statute here involved. This rule has been continuously applied.

See Mason *v.* Routzahn, 275 U. S. 175, 178; 65 Treas. Reg., Art. 1541; 101 Treas. Reg., Art. 42-3; 111 Treas. Reg., Sec. 29.42-3; 53 Harv. L. Rev. 853; 2 Mertens, Federal Income Taxation, 17.

See Tar Products *v.* Commissioner, 130 F. 2d 866, for an instance of the application of this rule to a taxpayer on the accrual basis. Compare 94 Treas. Reg., Art. 115-1 and 22(a)(1) for appraisal of position of those regulations as to date when dividends are received by a taxpayer. American Light & Traction Co., 3 T. C. 1048.

stock record of a certain day determines the earliest time for possible receipt.

Under the income tax acts no stockholder has a separate and divisible taxable interest in the assets of a corporation even though those assets have been increased by earnings. Earnings, before declaration of dividends, while increasing the value of his stock, have never been treated as an event to mark taxable income to the stockholder. Mere declaration of a dividend does not alter the stockholder's interest in the corporate assets. If no other factors were involved in value except earnings and dividends, the value of the stock would advance *pari passu* with earnings and the declaration of a dividend with a subsequent record date for payment would not affect the stock's value. *United States* v. *Phellis*, 257 U. S. 156, 171. See Schabacker, Stock Market, 353. The stockholder can acquire no interest in a dividend, amounting to an accrual under Section 42, before the amount of the dividend and the distributee is determined.

In applying to the present dividends our description of accruals under Section 42 as "assets of decedents, earned during their life and unreported as income, which on a cash return, would appear in the estate returns,"[7] the Court of Appeals may have treated the words "earned during" the decedent's life as though they included, prior to a declaration of dividends, the proportionate part of corporate earnings attributable to decedent's stock. If so, it is a more extended meaning than was intended since stock does not earn an identifiable separate taxable share of corporate profits for its owner before the corporation makes those profits available to the stockholder. It is not the earnings of a corporation but the separation of those earnings by a completed dividend which assigns a part of those earnings to a stockholder. The price a stockholder would receive on a stock sale after declaration and before the record date would reflect corporate earnings but would not reflect the declaration or non-declaration of a dividend. As the same value would be in the stock with or without the declaration, the price would be the same. Only an ex-dividend sale would affect price.

For the earnings of a corporation to pass into the earnings of its stockholder, so as to be subject to accrual to the stockholder under Section 42, something more than a declaration of dividends

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[7] 312 U. S. at 644-45; 144 F. 2d at 758.

with a subsequent record date to identify the distributee is required. Such a declaration leaves the identity of the recipient at large. Such uncertainty destroys any conception of accrued as involving a right to receive or an obligation to pay, elements which we think are essential for accruals under our decisions.[8]

Reversed.

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[8] This accords with the original holding of the Board of Tax Appeals on this question in Estate of G. Percy McGlue, 41 B. T. A. 1186, 1193. After that case was reversed on the law of New York, Helvering *v.* McGlue, 119 F. 2d 167, the Board followed the Circuit Court decision. Estate of Lewis Cass Ledyard, Jr., 44 B. T. A. 1056, 1065. Recently the Tax Court has held that a taxpayer on the accrual basis should account for a dividend when received. American Light & Traction Co. *v.* Commissioner, 3 T. C. 1048.